IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 1008 of 2006
With
CIVIL APPLICATION No. 9364 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH
AND
HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GOVT. OF INDIA - Appellant(s)
Versus
JAYAMAL BHAI JAYANTILAL THAKORE & 1 - Respondent(s)

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Appearance :
MS SEJAL K MANDAVIA for Appellant(s) : 1,
DR SONIA HURRA for Respondent(s) : 1,
None for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH

and

HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 21/08/2006
ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K.M.MEHTA)

The Union of India has filed this Letters Patent Appeal against the judgment and order dated 23.9.2005 passed by the learned Single Judge, wherein the learned Single Judge has allowed the petition of the original petitioner (respondent No.1 herein) and held that the petitioner is entitled to get pension under the Swatantra Sainik Samman Pension Scheme, 1980 (hereinafter referred to as “the Scheme”) with effect from the date of his application and the respondents are directed to calculate and pay the amount of arrears of pension under the Scheme within three months from the date of receipt of writ of the order.

2. The case of the petitioner Shri Jaymalbhai Jayantilal Thakore before the learned Single Judge was that from September 1942 to March 1943 the petitioner remained underground actively participating in freedom struggle while remaining underground and he had actively taken part in the freedom movement “Hind Chhodo Andolan” (Quit India Movement) along with Mahatma Gandhi without caring for his life. It is the case of the petitioner that the petitioner evaded arrest right from November 1942 till March 1943. The police could not arrest because he was repeatedly escaping and he was absconding. According to the petitioner, the petitioner remained underground all this time and, therefore, he was

entitled to Swatantra Sainik Samman Pension Scheme introduced by the Central Government in 1980. In support of his claim, the petitioner relied upon the following documents :-

(i) A certificate dated 17.5.1991 from Shri Nirubhai B Desai, a prominent freedom fighter certifying that from September 1942 to March 1943, the petitioner was a proclaimed offender.

(ii) A certificate from Shri Jayantibhai Thakore who recommended the case of the petitioner to the State Government for granting pension.

(iii) A list of active members of freedom struggle of 1942 – extract of book where the petitioner's name is shown.

(iv) A letter dated 21.12.1994 from Mr Harin Pathak, a Member of Parliament who stated that the petitioner was a renowned freedom fighter.

(v) The affidavit dated 15.4.2000 filed on behalf of the State Government by one Shri I.N. Solanki wherein it has been stated that the case of the petitioner is considered by the State Government for pension and the State Government

has already granted the same from 18.8.1992 and the State Government has also recommended the case of the petitioner to the Central Government vide their communication dated 8.2.1994.

3. Relying on the above documentary evidence, the petitioner filed a petition before the learned Single Judge of this Court for claiming pension. The petition was filed in May 1999. The State Government as well as the Union of India filed counter affidavits.

3.1 The learned Single Judge has after going through the evidence on record and after relying upon clause 9 of Swatantra Sainik Samman Pension Scheme and after going through various judgments of the Apex Court allowed the petition and held that the petitioner is entitled to get pension under the said Scheme of 1980 and the respondents have wrongly denied the said benefit to the petitioner.

3.2 Against the said judgment, the Union of India has filed the present appeal before this Court.

4. Ms Sejal Mandavia who appears on behalf of the Union of India has stated that the learned Single Judge has not properly considered clause 5 in this behalf. Clause 5 reads as follows :-

"5. Acceptability of Secondary Evidence

Secondary evidences can be considered only if supported by a valid Non-Availability of Records Certificate (NARC). The provisions of the Scheme were clarified to the State Governments in several circulars of the Govt. of India, gist of which is available in the Appendix attached herewith. The instructions on NARC were reiterated by the Govt. of India, Ministry of Home Affairs, vide Circular No.8/12/95-FF(P) dated 2.11.98, relevant extracts of which are reproduced as follows-

> "As per the scheme, claims of the applicants for samman pension are required to be supported by the duly verified official records of the relevant times. Only in case of non-availability of such records, secondary evidences, as specified in the scheme, can be made basis of such claims. However, due care and caution is required in such cases in view of several instances of bogus/forged claims which have come to the notice of the Central Government. It is of utmost importance that before recommending such cases, complete facts of the case in which the applicant claims involvement, are verified from all the agencies which could have been concerned with the matter. These may include the police station concerned, the District administration, the jurisdictional court, competent authority issuing detention order, the advisory board/ appellate court, prison authorities, and intelligence agencies. Discrete inquiry should also be made to ascertain genuineness of the claims. The NARC should be issued only after the above verification. It is reiterated that the NARC should invariably be worded as follows-
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> "All concerned authorities of the State

> Government who could have relevant records in respect of the claim of the applicant, have been consulted and it is confirmed that the official records of the relevant time are not available."

Clause (5), therefore, provides that secondary evidences can be considered only if supported by a valid Non-Availability of Records Certificate and discreet inquiry should be made to ascertain genuineness of the claims. In this case, the authority has not properly given the certificate and, therefore, there is a breach of clause 5.

5. We have gone through the record of this case. The learned Single Judge has relied upon Clause (9) of the Scheme which provides how the applicant should furnish the documents for obtaining pension, particularly Clause 9(b)(ii) for a case where the applicant remained underground.

> "9. HOW TO PROVE THE CLAIMS (EVIDENCE REQUIRED)
>
> The applicant should furnish the documents indicated below whichever is applicable :-
>
> (a) ... ...
>
> (b) REMAINDED UNDERGROUND :
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> (i) Documentary evidence by way of Court's/Government orders proclaiming the applicant as an offender, announcing an award on his head, or for his arrest or ordering his detention.

(ii) Certificates from veteran freedom fighters who themselves undergone imprisonment for five years or more if the official records are not forthcoming due to their availability."

6. After going through the documentary evidence on record as well as the affidavit of the State Government and even the recommendation of the advisory committee of the State Government and after relying upon several judgments of the Supreme Court, the learned Single Judge has held that the petitioner is entitled to get pension under the Swatantra Sainik Sanman Pension Scheme of 1980 and the respondents have unjustifiably denied the same to the petitioner. We have also considered the documentary evidence as well as the contentions and the observations of the learned Single Judge and we are also of the view that the findings of the learned Single Judge are based upon the documentary evidence as well as the judgments of the Apex Court and the learned Single Judge has given cogent and convincing reasons and, therefore, we do not see any reason to interfere in this behalf.

7. The learned counsel for the appellant has relied upon Clause (5) of the Scheme. According to us, clause (9) is applicable and clause (5) has no relevance. However, even if we consider the contention of the learned counsel for the Union of India that clause (5) applies, then as far as clause (b) is concerned, once the petitioner has remained underground, there will not be any question of any

record of jail authority in this behalf. The petitioner has produced the certificates which we have already referred in this behalf. In our view, the petitioner has produced documentary evidence of Shri Nirubhai Desai, Shri Jayantibhai Thakore and the letter from Shri Harin Pathak, a Member of Parliament and even the State Government had also recommended the case of the petitioner and State Government have verified all the documents in this behalf. The State Government has gone through the complete evidence of the case in which the applicant's claim is verified. We are of the view that the learned Single Judge has also considered all these aspects. The State Government has also seen the record and discreet inquiry was also made by the State Government and the genuineness of the claim has been considered by the State Government. In view of the same, even if clause (5) also applies, its requirements are satisfied.

8. In view of the aforesaid factual position , the petitioner has made out a case for grant of freedom fighter's pension. In Mukundlal Lal Bhandari vs. Union of India, Air 1993 SC 2127 the Apex Court has held that the object is to honour and where it is necessary, also to mitigate the sufferings of those who had given their all for the country in the hour of its need.

9. In Gurdial Singh vs. Union of India, JT 2001 (8) SC 165, the Apex Court has observed that, “As

the object of the scheme is to honour and to mitigate the sufferings of those who had given their all for the country, a liberal and not a technical approach is required to be followed while determining the merits of the case of a person seeking pension under the said Scheme". The Apex Court has further observed that, "Once on the basis of the evidence it is probabilised that the claimant had suffered imprisonment for the cause of the country and during the freedom struggle, a presumption is required to be drawn in his favour unless the same is rebutted by cogent, reasonable and reliable evidence".

9.1 In our view, therefore, the case of the petitioner is squarely covered by the aforesaid judgments of the Apex Court.

10. We are also of the view that the case of the petitioner is also covered by the Division Bench judgment of this Court in Union of India vs. Babulal Mohanlal Patel (supra). There also the record was not available and certificate from Shri Nirubhai Desai was produced. The learned Single Judge accepted the said case and thereafter the matter came up before the Division Bench. An identical argument was raised before the Division Bench also. The Division Bench after considering the judgment of the Apex Court in Mukund Lal Bhandari vs. Union of India, AIR 1993 SC 2127 and Gurdial Singh vs. Union of India, JT 2001 (8) SC 165 and decision of this Court in Late Ambalal Ratanbhai vs. Government of

India, 1995 (1) GLR 289 and other cases, dismissed the appeal.

11. The learned counsel for the respondents has also relied upon the judgment of this Court in Special Civil Application No. 3786 of 2001 decided by this Court (one of us KM Mehta, J.) dated 30.7.2001 which also was the case of a freedom fighter.

12. Over and above, the learned counsel for the Union of India has relied upon the judgment of the Apex Court in Bhaurao Dagdu Paralkar vs. State of Maharashtra, 2005 (7) SCC 605. We have gone through the said judgment in this behalf. However, in the facts of the present case, the said judgment is not applicable in this behalf.

13. We are of the view that the original petitioner who is a senior citizen who had taken active part in the freedom movement ought to have been respected with dignity and honour. In fact, the legislature has also enacted very noble scheme with very good objective to see that senior citizens like the petitioner are rewarded by the pension as per the Scheme. It may be noted that the Scheme has been formulated with a view to acknowledge the services rendered to the country by patriotic citizens during the freedom movement and who had suffered at the hands of British Rulers in one way or the other and to compensate them in some measure for their sacrifices for the sake of the country. In our view,

the Scheme is of beneficial nature and the provisions of the said scheme should be construed liberally.

14. At this stage, we may note that in the original petition, the petitioner has stated that in March 1943, the police had started running after the petitioner when the petitioner was running and tried to climb the wall, the police at that moment threw lathi on the petitioner which struck him hard and he fell from the wall of Astodia Municipal School with the result, both the hands and legs of the petitioner were fractured and there was deep injury on the kidney of the petitioner. The petitioner's one kidney was removed and thus till date, the petitioner is surviving on one kidney. .. but since petitioner's hands and feet were fractured and kidney was damaged, the police ordered for intern or house arrest of petitioner. Thus, the petitioner was kept interned in home under constant police watch. The petitioner, is a bonafide freedom fighter, hence denial of Samman pension to the petitioner is unjust and unfair.

14.1 After referring to the above averments, the learned counsel for the respondent- original petitioner has relied upon the judgment of the Apex Court in R. Narayanan vs. Union of India, AIR 1990 SC 746, particularly para 7. However, we do not deal with this point as the said point was not dealt with by the learned Singe Judge.

15. The appeal is, therefore, summarily

dismissed.

The Union of India is directed to calculate and pay the amount of arrears of pension to the original petitioner by 30th September 2006, and thereafter also continue to pay the pension regularly to the petitioner.

16. Since the appeal is dismissed, the civil application is also dismissed.

(M.S. SHAH, J.)

(K.M. MEHTA, J.)

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